In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No.

S. C. BIGELOW, as Receiver of Virginia & Truckee Railway (a corporation), and Virginia-Truckee Transit Co. (a corporation),

Petitioner,

vs.

H. A. ANDERSON, Individually and as President and Business Agent of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local No. 533 of Reno, Nevada,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE RAILWAY LABOR ACT APPLIES TO THE RAILWAY COMPANY, AND TO PETITIONER AS ITS RECEIVER, AND CONTROLS THEIR LABOR RELATIONSHIPS WITH ALL THEIR EMPLOYEES, INCLUDING THOSE ENGAGED IN DRIVING TRUCKS OPERATED BY PETITIONER ON THE PUBLIC HIGHWAYS AS AN ESSENTIAL AND INTEGRAL PART OF THE RAILWAY COMPANY'S COMMON CARRIER OPERATIONS.

The essential and basic question in this case is whether the railway company, and the petitioner as its receiver, are controlled and governed as to their labor relationships with the employees involved in this case by the Railway Labor Act (45 U. S. Code 151-163) or the National Labor Relations Act (29 U. S. Code Secs. 151-166).

The record establishes without challenge that the railway company is a common carrier by steam railroad engaged in the transportation of passengers and property in interstate commerce (R. 55-56). It is, therefore, a "carrier by railroad subject to Part I of the Interstate Commerce Act" (Railway Labor Act, Sec. 1, First), because squarely within the coverage of said Part I (45 U. S. Code, Sec. 1, paras. (1)(a), (3)(a)).

The employees involved in the case are likewise concededly employed directly by the railway company and carried on its payroll; as such, they are "subject to its continuing authority to supervise and direct the manner of the rendition of their service" (R. 56, 60, 67-68, 71-75).

There would thus seem to be no room for doubt as to the applicability of the Railway Labor Act; but the

Circuit Court nevertheless concluded that Act not to be applicable, because, as it said, the highway operations of the railway company were not shown or found to be connected with the rail operations (R. 134); nor was it shown, according to the Circuit Court (R. 138), that any of the truck men were engaged in any service, terminal, pickup or otherwise, "incidental to rail traffic." The Circuit Court concluded, that as to these truck drivers petitioner and the railway company were simply functioning as a common carrier by motor vehicle, not subject to Part I of the Interstate Commerce Act and, therefore, not capable of being classified as a "carrier" (i. e., employer) subject to the Railway Labor Act. The court therefore held that the National Labor Relations Act applied, and that the injunction granted by the District Court came within the prohibitions of the Norris-La Guardia Act.

The Circuit Court's conclusion is predicated on both a misunderstanding of the facts, and a misconstruction and misinterpretation of the applicable law.

Dealing first with the facts: The unchallenged evidence leaves no doubt that the motor-truck operations of the railway company, in which the employees involved were engaged, were conducted directly by that company as an essential and integral part of its entire common-carrier operation as a steam railroad common carrier engaged in interstate commerce (R. 55-57). Petitioner's testimony established that the trucking service was initiated for the purpose of handling less-carload freight (R. 56), and that only such less-carload freight (at least two-thirds of which

was interstate (R. 55), was handled by the railway trucks (R. 56-57); that the service was initiated to reduce expense, as against the more costly method of handling less-carload freight on the railway company's steam rail lines (R. 56); that a further purpose was to improve the service to the railway company's patrons and to place the company upon a competitive parity with truck operators in the same territory (R. 56); that the company continues to handle passengers and carload freight by rail as it had previously done (R. 55).

The trial court, in response to this testimony, duly found (its Finding No. VI, R. 108) that the petitioner was carrying on the trucking "as part of the operations of the Virginia & Truckee Railway". This finding was based upon proposed findings of fact submitted to the court by the petitioner (Proposed Finding No. XII, R. 93; Proposed Finding No. XVIII, R. 96), in which substantially similar statements were made. Although the respondent challenged many of the proposed findings submitted by petitioner (R. 99-105), it did not challenge either of these two; nor did respondent in his statement of points intended to be relied upon on his appeal (R. 125-128) question or challenge Finding No. VI of the District Court. There is, therefore, both ample evidence and an unchallenged finding to the effect that the trucking in which the involved employees were engaged was carried on as a part of the operations of the railway company; and, as the evidence shows, it was merely a substituted service, instituted in order to reduce the railway com-

pany's expenses and to improve the service to its patrons.

Second, as to the law: The narrow interpretation given to the Railway Labor Act by the Circuit Court conflicts with the express language and reasonable interpretation to be given to that statute and with the controlling decision of this court, construing and applying that language, rendered in

Virginian Ry. Co. v. System Federation (1937), 300 U. S. 515, 81 L. ed. 789.

The construction of the Railway Labor Act followed by the Circuit Court is erroneous in that it assumes that a single employer can be, in effect, subdivided into two entities, one of which is subject to the Railway Labor Act, while the other is subject to some other statute. There is nothing in the act which justifies such a construction. If an employer is a common carrier subject to Part I of the Interstate Commerce Act, then it is, by that very fact, subject to the Railway Labor Act, as to all of its employees who are engaged in or in any way connected with its transportation activities. No exception is made in the act as between employees actually engaged in rail transportion and those whose activities are related to such transportation. The language of paragraph First of Section 1 contains an exception, the effect of which is to remove from the coverage of the act a subsidiary of a railroad common carrier if that subsidiary is engaged in trucking service; but this exemption extends only to a subsidiary, and does not exclude trucking service operated directly—not through a sub-

sidiary—by a common carrier subject to Part I of the Interstate Commerce Act. By the very fact that the exemption is extended only to subsidiaries, emphasis is given to the non-exemption, even as to trucking service, of carriers who are directly subject to Part I of the Interstate Commerce Act.

In the *Virginian Case, supra,* the essential question of the coverage of the Railway Labor Act was substantially identical with that presented here. It was there contended by the carrier that, as to its "back-shop employees" and its labor relations with them, the Railway Labor Act did not apply, because the duties of those employees had no direct relationship to interstate transportation. It appeared that such employees were not within the scope of the Federal Employers' Liability Act, as it read at that time (1937); but this Court nevertheless found no difficulty in concluding that the Railway Labor Act was fully applicable to them. The court said (300 U. S., at p. 556):

> "The activities in which these employees are engaged have such a relation to the other confessedly interstate activities of the petitioner that they are to be regarded as a part of them. All taken together fall within the power of Congress over interstate commerce. *Baltimore & Ohio R. Co. v. Interstate Commerce Comm'n,* 221 U. S. 612, 619; cf. *Pedersen v. Delaware, L. & W. R. Co.,* 229 U. S. 146, 151. Both courts below have found that interruption by strikes of the back shop employees, if more than temporary, would seriously cripple petitioner's interstate transportation. The relation of the back shop to transportation is such that a strike of petitioner's em-

> ployees there, quite apart from the likelihood of its spreading to the operating department, would subject petitioner to the danger, substantial, though possibly indefinable in its extent, of interruption of the transportation service. The cause is not remote from the effect. The relation between them is not tenuous. The effect on commerce cannot be regarded as negligible."

So, in the present case, it is quite apparent that a strike of the petitioner's truck employees would have serious effects upon petitioner's rail-line operations, and might cause that service to be interrupted. Certainly it could not be said that the relationship between the common-carrier truck operations and the rail-line operations of the railway company was tenuous or the connection remote, or that the effect on commerce of the interruption of the truck-line operations would be negligible. On the contrary, the two operations were and are closely connected, are complementary to each other, and an interruption of one would be bound to affect the other seriously and continuously.

It has been suggested and may be again suggested that if this truck-line operation were conducted by a subsidiary of the railway company the Railway Labor Act would not apply; hence the mere fact that it is conducted directly by the railway company does not render the Act applicable. That suggestion finds a ready answer in the fact that the Railway Labor Act itself contemplates that it will not apply to a trucking subsidiary of a carrier, but no such exception is pro-

vided for a rail carrier which directly conducts truck operations; but is also conclusively answered by the language of this court at page 557 of the opinion in the *Virginian Case*. The court there said:

> "It is no answer, as petitioner suggests, that it could close its back shops and turn over the repair work to independent contractors. Whether the railroad should do its repair work in its own shops, or in those of another, is a question of railroad management. It is petitioner's determination to make its own repairs which has brought its relations with shop employees within the purview of the Railway Labor Act."

So, to paraphrase this language, it was within the railway company's managerial discretion to operate its own trucks as a part of its general transportation service, and it did so; that determination brought its relations with its employees engaged in the trucking service within the purview of the Railway Labor Act.

The Circuit Court was apparently influenced, to some extent, in reaching its erroneous conclusion as to the non-application of the Railway Labor Act by the fact that the Interstate Commerce Commission is given power by the provisions of Section 204(a) of Part II of the Interstate Commerce Act, as interpreted by this court in *United States v. American Trucking Associations,* 310 U. S. 534, 84 L. Ed. 1345, to regulate the maximum hours of these particular employees. But the authority thus conferred upon the Commission does not affect the rights, duties and obligations of the parties under the Railway Labor Act;

particularly their duty to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions (including hours of service) as provided by the Railway Labor Act. For many years, the maximum hours and certain other working conditions of steam railroad companies and their employees engaged in handling trains have been directly regulated by Congress through the so-called Hours and Service Act (45 U. S. Code 61-66); but it has never been held or suggested that this statute, which is completely analogous to the maximum-hours regulations of motor-truck drivers promulgated by the Interstate Commerce Commission, in any way supersedes or affects the rights and obligations of steam railroads and their employees under the Railway Labor Act.

The Circuit Court erred further in ignoring, as if without significance, the fact that these truck drivers, and petitioner (or the railway company) as their employer, are within the coverage of the Railroad Retirement and Railroad Unemployment Compensation Acts. Numerous decisions have been rendered by the Railroad Retirement Board holding that when trucking operations are in fact conducted by a railroad, as a department of the railroad, both the employer and the employees are within the scope of the Retirement-ment and Unemployment Compensation Acts.

Blue Line Transfer;
Baltimore and Ohio Railroad Company;
(Vol. 1, Railroad Retirement Board Bulletin, pp. 99-102.)

Similar decisions were issued covering the following companies:

Texas and Pacific Motor Transport Company;
Northern Pacific Transport Company;
Pacific Motor Transport Company;
Evansville & Ohio Valley Railway Company;
Buffalo, Rochester & Pittsburgh Warehouse, Inc.;
The Southern Pacific Transport Company (Texas);
The Southern Pacific Transport Company of Louisiana, Inc.

The essential importance of these rulings lies in the fact that the coverage clauses of the Railroad Retirement Act and Railroad Unemployment Insurance Act are practically identical, in so far as concerns the employers subject to those statutes, with the corresponding clause of the Railway Labor Act. A company which, as a matter of law, is an employer subject to either of the other Acts, is likewise a "carrier" (i.e., employer) within the meaning of the Railway Labor Act.

We do not urge that these rulings of the Railroad Retirement Board are conclusive upon this court, but they do represent a consistent course of interpretation of wholly analogous provisions, rendered by the administrative tribunal charged with the administration of the statutes in question; and in the absence of a contrary ruling they are entitled to great weight.

U. S. v. Healey, 160 U. S. 136, 40 L. ed. 369;

National Lead Co. v. U. S., 252 U. S. 140, 64 L. ed. 496;
U. S. v. Jackson, 280 U. S. 183, 74 L. ed. 361;
Mintz v. Baldwin, 289 U. S. 346, 77 L. ed. 1245;
Union Stock Yard etc. Co. v. U. S., 308 U. S. 213, 84 L. ed. 198.

II.

THE INJUNCTION GRANTED BY THE DISTRICT COURT WAS PROPER AS A MEANS OF ENFORCING THE OBLIGATIONS IMPOSED BY THE RAILWAY LABOR ACT.

The Railway Labor Act imposes upon employers and employees certain mutual obligations. It is primarily the duty of both employers and employee representatives to exert every reasonable effort to make and maintain collective bargaining agreements, and to settle all disputes, so as to avoid any interruption to commerce or the operation of any carrier growing out of any such dispute (Railway Labor Act, Sec. 2, para. First); to consider and if possible to decide all disputes in conference (para. Second); to give notice of a desire to confer in the event of a dispute, and to hold such conference upon receiving notice (para. Sixth). Where changes in agreements (which, of course, would include a proposed new agreement, as in the present case) affecting rates of pay, rules or working conditions are desired, the party making the proposal must give at least 30 days' written notice of the intended change and thereafter conferences must be held pursuant to such notice. If the parties cannot

agree and the services of the Mediation Board are invoked or proffered, or if the conferences terminate without mediation being invoked, at least 10 days must elapse before either party can take any further action (Railway Labor Act, Sec. 6). If mediation is invoked, the matter must be held *in statu quo* until mediation terminates (Sec. 5, First, Second). Finally, if the dispute is still unsettled and threatens to culminate in a strike which would interrupt essential transportation service, an emergency board may be appointed by the President, and, pending its investigation and report, neither employer nor employees may take any further steps toward changing the existing status (Sec. 10).

All of these provisions were designed, as it has been said, to insure that the peaceful processes of negotiation, mediation and arbitration, together with a final cooling-off period after all of these had failed, would intervene between the initiation of a dispute and the final resort to strike or threat thereof as a means of settlement. And the obligation equally rests, not only upon the employer, but also upon the employees, to observe all of these requirements of the Act.

There is no contention—indeed there is no suggestion—that the employees who threatened to strike, to picket and otherwise to resort to "economic force" to impose their will upon the petitioner as an employer, have ever undertaken any of the steps required by the Railway Labor Act, or that they contemplated so doing. In effect, as the District Court found (R. 106-

107), and as the Circuit Court said in its opinion (R. 135), the respondent, as the representative of the employees, notified petitioner that unless his proposals were accepted by a certain day a strike would be called and the receiver's business picketed and boycotted.

There was no question, apparently, in the mind of the Circuit Court, and in the light of this court's controlling decisions there can be no question, that if the Railway Labor Act is applicable the injunction granted by the District Court was and is proper and should be affirmed. In this behalf, the Circuit Court said in its opinion (R. 136):

> "There is no question that the injunctive decree is valid if the Railway Labor Act controls, for none of the requirements which are conditions precedent to the right of rail carrier employees to strike were satisfied."

The instant case, in this respect, as in others, falls squarely within the principles followed in the *Virginian Case, supra.* There this court sustained an injunction granted by the District Court against an employer's refusal to negotiate with the chosen representative of its employees, with respect to their demands for an agreement covering wages, hours and working conditions, and its threat to negotiate with some other purported representative of some or all of the particular classes of its employees involved in the case. The court squarely held that the mandatory injunction was an appropriate remedy to compel the carrier to comply with its statutory obligations; and expressly declared, in answer to objection, that (300 U. S. 563):

> "It suffices to say that the Norris-La Guardia Act can affect the present decree only so far as its provisions are found not to conflict with those of Sec. 2, Ninth, of the Railway Labor Act, authorizing the relief which has been granted. Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-La Guardia Act."

See, also,

Railway Employees' Assn. v. Atlanta B. & C. R. Co. (D. C., Ga., 1938), 22 F. Supp. 510.

Of course, if injunction will lie to compel an employer, at the suit of employees, to fulfill its statutory obligation, it will equally lie to compel the performance by employees of their obligations under the same statute. The obligations imposed by the Railway Labor Act rest alike upon both employers and employees: the very essence of the statute consists of this mutual duty to meet and confer in the effort to arrive at peaceful settlements; to "make and maintain" collectively-bargained agreements, and otherwise to conform to the processes provided therein for the orderly settlement of disputes. Compare:

Texas & N. O. R. Co. v. Ry. Clerks, 281 U. S. 548, 74 L. ed. 1034,

in which this court declared (at p. 567), in the course of a discussion of the Railway Labor Act of 1926 (all the principal features of which are retained in the 1934 statute):

> "It is thus apparent that Congress, * * * while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between com-

mon carriers and their employees, thought it necessary to impose, *and did impose, certain definite obligations enforceable by judicial proceedings.*" (Emphasis ours.)

We ask the court also to note the recent decision in *Delaware & H. R. Corp. v. Williams, et al.* (C. C. A. 7th, 1942), 129 F. (2d) 11, in which, upon complaint of a carrier subject to the Railway Labor Act, the Circuit Court enjoined the representatives of the labor organizations constituting the labor membership of the First Division of the National Railroad Adjustment Board, who were threatening, in disregard of the orderly procedure provided in the Act for the settlement of disputes, to permit such disputes to be withdrawn from the First Division, to be subsequently resubmitted by the employees, although the disputes had practically reached the stage of final determination by the Division. The Circuit Court thus again sustained the principle that compliance with the obligations of the Railway Labor Act may be effectuated, if need be, by mandatory judicial process.

The injunction granted by the District Court in the instant case was proper, not only because of the respondent's failure to conform to the orderly procedure provided by the Railway Labor Act; it was particularly appropriate because the purported "agreement" tendered to, and proposed to be forced upon the petitioner by the duress of strike and boycott, provides for a "closed shop": i.e., that every employee subject to its terms must be, or become, a member of the re-

spondent union in order to retain his job (R. 16-17). Paragraphs Fourth and Fifth of Section 2 of the Act expressly outlaw the "closed shop" among employees subject to the Act.

CONCLUSION.

Because of the demonstrated errors of the Circuit Court of Appeal in rendering its opinion and decision in the instant case, and because of the importance of a proper decision in this case, this court should exercise its supervisory power of review by granting the writ herein applied for, and thereafter, upon review of the case on the merits, should reverse the Circuit Court's decision and affirm the decision of the District Court.

Dated, San Francisco, California,
October 21, 1942.

Respectfully submitted,
HENLEY C. BOOTH,
BURTON MASON,
Attorneys for Petitioner.

DUNCAN A. MCLEOD,
WALTER ROWSON,
Of Counsel for Petitioner.

(Appendices A to G Follow.)